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Supreme Court, U.S.
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No. 04-1057

IN THE

Supreme Court of the United States

LORRAINE "JADE" MCKENZIE,

Petitioner,

v.

MARK BENTON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF NATRONA COUNTY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent acknowledges the existence of a circuit conflict on the allocation of the burden of proof of "direct threat" in an employment discrimination case under the Americans with Disabilities Act ("ADA"). *See* Br. in Opp. 11-12. Four courts of appeals, including the court of appeals in this case, have likewise recognized the existence of a split. *See* Pet. App. 18a; *Branham* v. *Snow*, 392 F.3d 896, 906 n.5 (7th Cir. 2005); *Hutton* v. *Elf Atochem N. Am., Inc.*, 273 F.3d 884, 893 n.5 (9th Cir. 2001); *Rizzo* v. *Children's World Learning Centers, Inc.*, 213 F.3d 209, 212-13 & nn.2-3 (5th Cir. 2000) ("*Rizzo III*"). Respondent attempts to minimize the depth and breadth of the split, and asserts that the allocation of the burden of proof makes no difference in this case, but he is wrong on both counts. In short, this case presents an important question on which the circuits are divided, and there is no reason to delay resolution of the circuit split. Accordingly, the petition should be granted.

I. The Split On The Question Presented Is Both Wide And Deep.

Respondent tries to narrow the scope of the issue in this case to the allocation of the burden of proof of "direct threat" in cases in which the job or jobs at issue "involve inherent danger." *See* Br. in Opp. i, 11-17. Respondent's re-writing of the question presented is not justified, but in any event it does Respondent no good. Even if one considers only "inherently dangerous" jobs, there is a 4-to-2-to-1 circuit conflict on the proper allocation of the burden of proof of "direct threat."

Respondent's effort to rewrite the question presented is unjustified. It is true that two circuits (the First and Tenth) consider whether a job is inherently dangerous or involves essential functions that raise safety concerns. As the petition in this case explained, the First Circuit articulated this

position in 1997 in *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997). *See* Pet. App. 9-11.

Most circuits, however, do not consider these factors. This is not because these circuits were unaware of *Amego*. Each of the four courts of appeals that allocates the burden of proof of the direct threat defense to the defendant decided or reaffirmed that allocation *after* the *Amego* decision. Indeed, three of these circuits specifically cited *Amego* and declined to follow it. *See Branham*, 392 F.3d at 906 n.5; *Hutton*, 273 F.3d at 893 n.5; *Rizzo III*, 213 F.3d at 212-13 & nn.2-3. Respondent's suggestion (Br. in Opp. 17) that these circuits will overturn their precedents is thus without merit.[1]

Moreover, Respondent's attempted rewriting of the question presented does not cause the circuit split to dissolve. Decisions of four other circuits conflict with the holding below, whether or not one views the split through Respondent's "inherently dangerous" formulation of the question presented.

Respondent correctly recognizes that the ruling below conflicts with the Seventh Circuit. *See* Br. in Opp. 16

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[1] Respondent's assertion (Br. in Opp. 11-12) that the Eleventh Circuit's decision in *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), is limited to inherently dangerous jobs is contrary to the views expressed by the Eleventh Circuit and other courts that have considered the decision. The Eleventh Circuit stated, "The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available." *Moses*, 97 F.3d at 447. The Eleventh Circuit has repeatedly used the "at all times" language to describe its allocation of the burden of proof to plaintiff. *E.g.*, *Lowe* v. *Ala. Power Co.*, 244 F.3d 1305, 1306 (11th Cir. 2001); *LaChance* v. *Duffy's Draft House, Inc.*, 146 F.3d 832, 836 (11th Cir. 1998). No other court has suggested that the language in *Moses* allows for any exceptions. *See, e.g.*, Pet. App. 18a; *Hutton*, 273 F.3d at 893 n.5; *Rizzo II*, 173 F.3d at 259 ("[T]hat opinion allows for no exceptions to this rule.").

(Seventh Circuit reached "a meaningful contrary conclusion" on the question presented in *Branham* v. *Snow*, 392 F.3d 896 (7th Cir. 2004)). Respondent also recognizes that the Ninth Circuit "allocate[d] the burden of proof to defendant in connection with an inherently dangerous job" in *Hutton* v. *Elf Atochem N. Am., Inc.*, 273 F.3d 884 (9th Cir. 2001). Br. in Opp. 15. There is no basis for Respondent's suggestion (Br. in Opp. 16) that the *Hutton* court did not address the issue "squarely." The court's opinion specifically mentioned the evolving circuit split. 273 F.3d at 893 n.5. In addition, the court described (but did not follow) the First Circuit's decision in *Amego* that plaintiff bears the burden to prove she can safely perform a job's essential functions. *Id.* Thus, even under Respondent's erroneous view of the question presented, the Seventh and Ninth Circuits are squarely in conflict with the Tenth.

Further, respondent's question presented would not alter the conflict between the ruling below and the Second and Fifth Circuits. Respondent's contention that *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.23d 208 (2d Cir. 2001), "did not involve essential job requirements that inherently involved safety concerns," Br. in Opp. 13, is simply wrong. The *Lovejoy-Wilson* plaintiff was unable to drive because of epilepsy. 263 F.2d at 213. She sought a promotion to gas station manager, but was turned down because she could not perform the required task of driving to the bank to make deposits. *Id.* Nevertheless, the Second Circuit, ruling four years after *Amego*, did not place the burden on plaintiff to prove she was not a direct threat.

Respondent also argues that the Fifth Circuit "does not disagree with the Tenth Circuit." Br. in Opp. 14. But as Respondent correctly acknowledges, the Fifth Circuit "shift[s] the burden of proof of direct threat back to the employer where the safety requirements 'screen out or tend to screen out the disabled.'" *Id.* (quoting *Rizzo II*, 173 F.3d at 259-60). Respondent argues that this standard does not

conflict with the Tenth Circuit because McKenzie "never challenged the safety requirement itself and never argued that it tended to screen out the disabled." Br. in Opp. 14. But Respondent never articulated any safety requirement that McKenzie could not satisfy. In fact, Sheriff Dovala admitted that he based his decision on his knowledge of McKenzie's history of mental problems. Pet. App. 4a-5a, 30a-31a. To the extent that Respondent asserts a "safety requirement" that applicants lack a history of mental illness, the requirement by definition screens out the disabled. Had this case been decided in the Fifth Circuit, the burden of proving direct threat would have been allocated to the defense.

Finally, as noted *supra*, note 1, the ruling below conflicts with the Eleventh Circuit, which places the burden of proving direct threat "at all times" on plaintiff. The Eleventh is thus yet another circuit in conflict with the Tenth Circuit below.

Respondent's articulation of question presented does not alter the various positions of the circuits. The parties agree that the burden of proof in the First and Tenth Circuits depends on the nature of the job involved. *Amego*, 110 F.3d 135; Pet. App. 20a. This view conflicts with all of the other courts of appeals to have considered the question. The circuit split is well-defined and can only be resolved in this Court.

II. This Case Is An Appropriate Vehicle To Resolve The Conflict.

Respondent contends that this case would have come out the same way regardless of the district court's allocation of the burden of proof. Br. in Opp. 8-11. The court of appeals did not agree. In fact, the assignment of the burden of proof of "direct threat" was the dispositive issue in this case.

The burden of proof of direct threat was the pivotal issue at trial and on appeal. The parties briefed the issue before trial, and argued it in the jury instruction conference. R. 1:31-

32, 5:811-14.[2] The jury found all the facts necessary for McKenzie to prevail except for the "direct threat" issue. The jury found that McKenzie was disabled under the ADA, that she was otherwise qualified for the position she sought, and that Respondent discriminated against her because of her disability. Pet. App. 6a. It also found that McKenzie posed a "direct threat"; this finding determined the outcome. *Id.* The court of appeals extensively discussed the assignment of the burden of proof, but did not hold or suggest that the resolution of that issue makes no difference in this case. Pet. App. 16a-22a.

The ADA's regulations require that an employer make an individual determination of "direct threat."

> The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's *present ability* to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R. 1630.2(r) (emphasis added). It is undisputed that Respondent did not perform any such assessment in this case. Pet. App. 5a. Although McKenzie was willing to take a psychological examination, Respondent would not allow it. Pet. App. 26a. As Respondent testified, McKenzie "didn't make it to that step." Pet. App. 31a.

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[2] "R. _:__" refers to the trial transcript by volume and page number. "Resp. C.A. App." refers to Respondent's Appendix in the Court of Appeals.

Instead of performing the individualized assessment the ADA requires, the sheriff relied on his own knowledge of McKenzie's mental health history. Pet. App. 5a, 30a-31a. Respondent's brief recites the incidents caused by McKenzie's post-traumatic stress disorder ("PTSD"), but these incidents do not prove she was a direct threat at the time she sought reemployment.[3] In fact, these incidents occurred during a relatively brief time in 1996, when McKenzie was trying to come to terms with the fact that her father raped her in her childhood.[4] Respondent nevertheless argues that these incidents prove McKenzie was a direct threat. Br. in Opp. 7. To the contrary, relying on past mental illness to determine a present "direct threat" is an assumption "based on prejudice, stereotypes, or unfounded fear," contrary to the purpose of the ADA. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287 (1987) (Rehabilitation Act case); *see* 42 U.S.C. § 12101. The allocation of the burden of proof in this case allowed the jury to similarly rest its verdict on fear and stereotype.

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[3] Respondent significantly overstates the incidents of McKenzie's mental illness. For example, it is not true that McKenzie "was found . . . firing her service revolver into the grave of her dead father and having overdosed on prescription medications." Br. in Opp. 4. McKenzie was alone at the cemetery when she fired her personal weapon. McKenzie herself called her former sergeant, who called other officers to respond to the cemetery. R. 2:145-47. There was no testimony that she had "overdosed," and the officers dispatched to the cemetery never "describe[d] Petitioner as intoxicated and irrational," nor did they testify that they "believed she was a danger both to herself and the public." Br. in Opp. 4; *see* R. 4:514-18 (Officer Hadlock); R. 4:546-52 (Officer Rostad). Further, McKenzie was not released from the hospital "on condition" of outpatient therapy and supervision. Br. in Opp. 4. Instead, McKenzie was discharged "with a recommendation to attend Partial Programming" and continue therapy. Resp. C.A. App. 1106.

[4] Respondent describes one incident on January 28, 1997, but the testimony he cites refers to events on October 7, 1996. Br. in Opp. 6.

Moreover, Dr. Viray wrote on November 20, 1996, "As [McKenzie's] treating physician, I definitely agree that she is ready to return to work." Resp. C.A. App. 1155. Far from repudiating this letter at trial, Dr. Viray specifically reaffirmed it. She testified, "As of November 20th, 1996, I believe that Lorraine is free of symptoms of her illness with the use of medication, and with that I believe that she is able to return to her premorbid functioning." R. 2:207. Dr. Viray further testified, "'Premorbid' means before she got ill, and the best thing I could evaluate a person is that they're free of their illness, and so that means that they are able to function back to their useful activities." *Id.*[5]

McKenzie's counselor, Darlene Bayuk similarly testified that McKenzie was able "to work in any position for which she is technically qualified." R. 3:390. Bayuk stated that her determination was based on McKenzie's "ego functioning," her ability to think logically, her "planning and organizational skills," her "abilities to cope with stress," her ability to "assess the situation and reasonably predict consequences," and her ability to monitor "what's going on with her and relate that to external reality or stimulus and behave appropriately." *Id.* at 390-91. Bayuk testified that McKenzie is "above average in all of these areas of functioning." *Id.* at 391.[6] Had the burden of proof properly

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[5] The record does not support Respondent's assertions that Dr. Viray repudiated her letter. Br. in Opp. 6, 9. Dr. Viray did testify on cross examination that there is no way to guarantee that symptoms of PTSD will not recur. R. 3:432. But that line questioning itself shows plaintiff should not be required to prove absence of "direct threat." Under Respondent's theory, anyone with a history of PTSD would be permanently disqualified from any "inherently dangerous" job.

[6] Although Respondent argues McKenzie did not present evidence that she could safely perform her job, in fact she presented evidence of her ten years of service with an unblemished record. Respondent never argued that McKenzie engaged in inappropriate conduct while on the job.

been placed on defendant, Petitioner would have prevailed. The error here was far from harmless.[7]

III. Respondent's Argument On The Merits Affords No Basis For Denying Review.

Respondent's interpretation of the "direct threat" defense finds no support in the ADA or its implementing regulations. Respondent contends that the "direct threat" defense relates only to the "validity" of a no "direct threat" qualification standard, rather than to the application of such a standard to a particular plaintiff. Br. in Opp 20. This interpretation contradicts the plain language of act. Section 12113(a) states:

> It may be a defense to a charge of discrimination under this Act that an alleged *application* of qualification standards, tests or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(emphasis added). Assuming Respondent is correct that the relevant "qualification standards" in this case include a requirement that Petitioner not pose a direct threat to health or safety, Petitioner clearly advanced a "charge of discrimination under [the ADA]" that the "application" of

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[7] There is no basis for Respondent's suggestion that the Court may be unable to decide the burden of proof question in this case. Br. in Opp. 10 n.6. If the Court decides the burden of proof question, it has discretion to remand the case to the courts below to apply the proper legal standard to the facts of this case. *E.g.*, *Johnson* v. *California*, 125 S. Ct. 1141, 1148 (2005).

that standard denied "a job or benefit to an individual with a disability," namely the Petitioner. To avail himself of the defense, Respondent must show that the *application* of the standard to McKenzie was job-related and consistent with business necessity, and that reasonable accommodation was not feasible. It is the "application" of the standard—not the standard itself—that must be shown to be job-related and consistent with business necessity.

The EEOC's regulations and interpretive guidance confirm this reading. The regulations require that the employer perform a specific individualized assessment of an individual's present ability to safely perform the essential functions of the job. 29 C.F.R. § 1630(r). "For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat." 29 C.F.R. § 1630 App. The employer must then consider the duration of the risk, the nature and severity of the potential harm, the likelihood of the harm occurring, and the imminence of the potential harm. *Id.* This evaluation must be done by the employer, well before the plaintiff commences a lawsuit or asserts a particular type of ADA claim.

In short, Respondent is wrong to assert that § 12113 comes into play only when a plaintiff contends that a qualification standard is generally invalid in all its applications. As with other affirmative defenses, the burden of proofing the defense that an ADA plaintiff posed a "direct threat" to the health or safety of other individuals is properly placed on the defendant. Pet. App. 17-20.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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